LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JAN 7 1952
CHARLES ELMORE CROPLEY
CLERK

No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1951

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, APPELLANT

vs.

THE UNITED STATES OF AMERICA, Interstate Commerce Commission, et al.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Civil Action No. 7769 (1)

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

MOTION TO AFFIRM

Appellees, United States of America, and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the district court be affirmed.

This is a direct appeal from the final judgment and decree entered on November 19, 1951,[1] by a specially-constituted district court of three judges convened pursuant to Section 2284, Title 28 of

[1] The court's opinions, rendered by Judges Sanborn and Hulen, Judge Moore dissenting, were entered on October 30, 1951, and are not yet reported.

the United States Code, dismissing appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on December 6, 1951, and appeal papers were served on December 11, 1951.

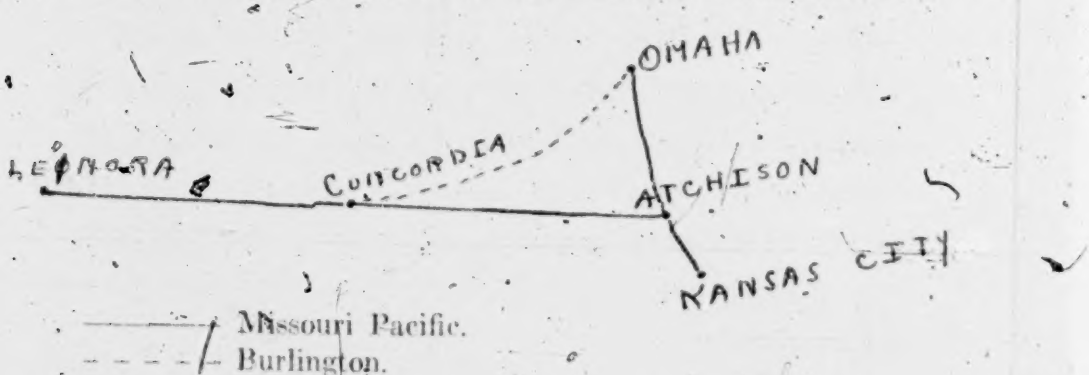
The Commission's order dated July 10, 1950, required appellant railroad to establish reasonable rates for the transportation of grain and grain products shipped from points on its line in central Kansas to Omaha, Nebraska, and Council Bluffs, Iowa, over routes maintained between such points by the appellant (hereinafter sometimes referred to as Missouri Pacific) in connection with the Chicago, Burlington & Quincy Railroad (hereinafter sometimes referred to as the Burlington), which rates were not to exceed rates maintained by the plaintiff between similar origin points and Kansas City, Missouri.

Proceedings leading to the issuance of the order were instituted by the Commission upon the complaint of the Omaha Grain Exchange of Omaha, Nebraska, a corporation whose membership includes merchants, manufacturers and millers buying, selling, receiving, processing and shipping grain and its products. In its complaint the grain exchange alleged that the rates[2] on grain and grain products from points in Kansas on the Central

[2] Rates and differences in rates are expressed herein in amounts per hundred pounds in conformity with similar statements in the Commission's report.

Branch line of the plaintiff, Concordia and west thereof, applicable over that railroad to Concordia, thence over the line of the Burlington to Omaha and Council Bluffs (hereinafter sometimes referred to as the Concordia route), were unreasonable and unduly prejudicial, and requested the Commission to prescribe reasonable rates for the future.

For the convenience of the Court, we have prepared a rough sketch showing the approximate distances and directions of the routes here involved.



The record shows that on grain shipments moving over the Missouri Pacific lines from Lenora, Kansas—a typical origin shipping point for grain—through Atchison to Omaha, a distance of 449.5 miles, the rate is 25.5 cents per hundred pounds. If the grain is shipped over the Missouri Pacific to Concordia, and then via the Burlington to Omaha, a distance of only 336 miles, the combined rate for the distance is 30 cents per hundred pounds. However, on grain shipments via the Missouri Pacific from Lenora to Kansas City, a

distance of 321 miles, or five miles less than the combined route to Omaha, the rate is only 19 cents per hundred pounds. The record further shows that Omaha and Kansas City are competing areas for grain milling, and that a differential of one cent in freight rates will divert traffic from one market to the other.[3]

The Commission found, on the basis of the evidence before it, that a "through route" existed between central Kansas and Iowa over the combined route of the Missouri Pacific and Burlington. It accordingly directed the Missouri Pacific to establish reasonable rates for grain shipped from its lines in central Kansas to Omaha, Nebraska and Council Bluffs, Iowa, over the combined routes, which rates were not to exceed rates for grain moving wholly over its own line from mid Kansas to Kansas City.

This appeal presents only the narrow question whether the Commission's finding that a through

---

[3] The inability of the Omaha millers and merchants to effectively compete with similar persons and industries in Kansas City for the purchase of grain in the Central Branch area because of the noncompetitive single line rate maintained by the plaintiff (25.5 as compared to 19 cents), and because of the excessive combination of rates applicable over the short route through Concordia, was the basic reason for the filing of the complaint by the Omaha interests seeking a reasonable through rate over the through route maintained by the appellant in connection with the Burlington through Concordia.

The complaining witnesses before the Commission demonstrated that a differential of a cent in freight rates will adversely affect a market.

route exists from Kansas to Omaha is supported by substantial evidence. Appellants themselves concede that the "only issue" presented "is whether or not [such] a through route exists." The division in the court below arose over whether there was substantial evidence to support the finding, the majority holding that the finding had adequate evidentiary support.

We submit that the evidence before the Commission clearly establishes that such a through route exists.

This Court in *St. Louis Southwestern Ry. Co.* v. *United States*, 245 U.S. 136, 139 (Note 2), in referring to the decision of the Commission in *Through Routes and Through Rates*, 12 I.C.C. 163, said:

> A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a "through rate." This "through rate" is not necessarily a "joint rate." It may be merely an aggregation of separate rates fixed independently by the several carriers forming the "through route"; as where the "through rate" is "the sum of the locals" on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation.

In the instant case the Commission clearly explained the basis of its action in the following discussion contained in its report on reconsideration entered July 10, 1950:

> . . . As through routes are already in existence at combination rates over the short routes through Concordia by way of the Missouri Pacific and the Burlington, and the only relief here sought by complainant being reasonable rates over those routes, division 2 correctly concluded that it was unnecessary to discuss the provisions of section 15 (3) and (4), and that those provisions of the act were no bar to the prescription of reasonable rates over such routes, citing Virginian Ry. v. United States, 272 U.S. 658, 666. In that case through routes were also in effect at combinations of through rates, and there was no request for joint rates. Our order requiring the combinations to be reduced to a reasonable level was upheld by the United States Supreme Court.
>
> * * *
>
> The rates in issue here are assailed as being unreasonable and unduly prejudicial under sections 1 and 3 of the act. Complainant does not seek through routes because, as previously stated, it already has such routes and can use them if it elects to pay the excessive combination rates in effect over such routes. Nor does it here seek the prescription of joint rates. The form of the through rates, whether joint or combination, is of no particular concern to

> complainant so long as such rates are not unreasonable nor unduly prejudicial. We think it is clear that the assailed combination through rate of 30 cents from Lenora to Omaha, for example, over the Missouri Pacific-Burlington route through Concordia, is unreasonable as compared with a rate of 19 cents from Lenora to Kansas City for a haul 5 miles longer than to Omaha. We also think it is clear that the next-above-quoted excerpt [4] from the Court's decision there cited authorizes us, in the situation presented here, to prescribe reasonable and nonprejudicial rates from the Central Branch to Omaha, and that the provisions of sections 15 (3) and (4) are no bar to such action.

Not only the Commission's findings, but appellant's own admissions as well, indisputably establish the fact that through routes are already in existence via Concordia over the lines of the ap-

[4] The citation by the Commission was an excerpt from the opinion in *Atchison, T. & S. F. R. Co.* v. *United States*, 279 U.S. 768, 776-7, as follows:

"The broad power to pass on the reasonableness of rates conferred upon the Commission in 1887 has not been in terms limited by any amendatory act. On the other hand, there has been much legislation designed to make the power more effective. The special power to establish through routes and joint rates was not conferred until 1906. Act of June 29, 1906, c. 3591, section 4, 34 Stat. 584. There is not in that act as amended, see United States v. American Express Company, 265 U.S. 425, 430, note 2, or in any decision of the Commission applying it, to which attention has been called, the slightest basis for the suggestion that in conferring the restricted power to establish through routes, Congress intended to limit the theretofore unrestricted power of the Commission to pass upon the reasonableness of rates.

pellant and the Burlington. In this connection the petition for reconsideration filed by appellant with the Commission on November 8, 1948, sets forth in its introduction that,

> *The route* over which the rates are assailed is not a published tariff route; it is closed to all intents and purposes *by reason of the fact that the rates applicable over said route* are made a combination of locals on Concordia and are higher than the through rate over the single line route of the Missouri Pacific. [Emphasis supplied.]

On page 10 of its petition the appellant stated:

> The Concordia route is closed to all intents and purposes by reason of the fact that the higher combination of rates apply over that route; it is not a published tariff route on grain and grain products.

Appellant thus apparently suggests that the route, although in existence, is in fact "commercially closed," and hence not a through route. This contention, however, was specifically rejected by this Court in *Virginian Railway Company* v. *United States*, 272 U.S. 658, 666-7. See also *New York* v. *United States*, 331 U.S. 284, 342-3; *Great Northern* v. *United States*, 81 F. Supp. 921, affirmed 336 U.S. 933.

As shown by the District Court's opinion, the first requisite to a through route is a physical connection between the tracks of the connecting car-

riers. The district court took notice of the fact that the Official Railway Equipment Register, compiled by the various railroads, shows that the two carriers involved in this case each list Concordia as a point of interchange of traffic with other lines, thus holding out to the public the existence of facilities for operations and the existence of a through route.

As described in the Court's opinion, L. E. Kipp, General Traffic Agent for various lines operating in the area involved in this case, including the appellant, has published on behalf of the carriers class rates covering the shipment of specific commodities between points of origin in the area along the line of appellant and destination area along the line of the Burlington, to stations short of Omaha and over the route which the Commission found to be a through route.

The District Court also noted that each of the carriers has local rates over its part of the route involved. In the course of oral argument the appellant admitted that a shipment of grain could be made at the tariff rate composed of a combination of such local rates. The appellant also admitted before the District Court that the existence of the class rates between the origin and destination points would justify the issuance of a through bill of lading for a shipment over the Concordia route.

These facts amply justify the District Court's conclusion that

> Evidence of physical interchange connection[s] at Concordia, plus long established joint rates to some points on the Burlington short of Omaha plus combination rates [on grain] to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route.

The lack of merit in this appeal is also clearly apparent by review of the so-called "substantial" questions which appellant alleges are involved. With respect to question numbered 1, it is clear from the District Court's opinion that no party contended that the existence of a physical track connection alone would support a conclusion that a through route was created. The three remaining questions disclose compliance by the appellant with Sections 1 (4), 3 (4) and 6 (1) of the Act, and in themselves afford substantial support for the conclusion that a through route was in existence. It is apparent from the language of the questions framed that the sections of the Act involved only require *reasonable* action on the part of the carriers concerned, and only in the case where there is non-compliance on the part of a carrier is it necessary for the Commission to test the standard of reasonableness in an action under Section 15 of the Act. The admitted compliance by the ap-

pellant with its duty under Section 1 (4) to establish a reasonable through route made it unnecessary for the Commission to proceed under Section 15 (3) to cause such compliance. Such action by the appellant not only attests to the factual incidents of the controversy, but shows that appellant believed such action on its part to be reasonably required.

This appeal thus presents no substantial question, but the narrow issue of whether a particular route of two connecting carriers is in fact a through route. We submit that the decision of the Commission and the court below on this point is clearly correct.

Appellant's attempt to inject the issue of alleged compulsory short-hauling in violation of Section 15 (4) of the Interstate Commerce Act is predicated upon the assumption that the Commission established a *new* through route. The section by its terms becomes operable only when the Commission compels a carrier to establish such a route under Section 15 (3). The evidence is clear, however, that the Commission did not establish any new through route, but merely required the carrier to fix reasonable rates on an already existing through route.[5] Such action plainly was in con-

[5] Moreover, appellant does not now transport any grain between the points involved, so any short-hauling would only be of phantom traffic.

formity with the standards of Sections 1 and 3 of the Act, and no issue arises under Section 15 (4).

For the foregoing reasons it is clear that the appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,
Department of Justice,
Washington, D. C.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
Washington, D. C.

DECEMBER 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1952 993089 421